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CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1932.

No. 964

AMY ARZT and JOSEPHINE RAMSEY,

Petitioners
(Appellants Below),

vs.

RUDOLPH B. FLERSHEM, et al., as Reorganization Committee, etc., BANKERS TRUST COMPANY, as Trustee, NATIONAL RADIATOR CORPORATION, Delaware, NATIONAL RADIATOR CORPORATION, Maryland, ROBERT S. WATERS and WILLIAM G. HEINER, as Receivers, etc., and CARL E. RESLEY and G. FRANKLIN LUDINGTON,

Respondents
(Appellees Below),

FIRST NATIONAL BANK OF CINCINNATI, INTERNATIONAL HEATER COMPANY and EDWARD J. RAMSEY,

Respondents
(Appellants Below).

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

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RUDOLPH B. FLERSHEM, CHARLES O. CORNELL, JOHN H. WATERS and FRANK B. CAHN, as the Reorganization Committee constituted under the Plan and Agreement, dated February 11, 1931, for the Reorganization of National Radiator Corporation, BANKERS TRUST COMPANY, as Trustee, NATIONAL RADIATOR CORPORATION, Delaware, NATIONAL RADIATOR CORPORATION, Maryland, ROBERT S. WATERS and WILLIAM G. HEINER, as Receivers of National Radiator Corporation, Delaware, and CARL E. RESLEY and G. FRANKLIN LUDINGTON,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

To the Honorable CHARLES E. HUGHES, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

AMY ARZT and JOSEPHINE RAMSEY respectfully pray that a writ of certiorari issue to review the decree of the United States Circuit Court of Appeals for the Third Circuit, entered on March 24th, 1933, affirming the decree of the United States District Court for the Western District of Pennsylvania, dated September 8th, 1932, made by Judge Gibson, confirming the sale of the assets, property and business of said corporation made by Robert S. Waters and William G. Heiner, as receivers of National Radiator Corporation, directing the receivers to deliver to the purchaser of the property a deed thereto, and approving the Plan of Reorganization of the Reorganization Committee.

Statement.

On October 5th, 1931 (R., 10), the respondents, Rudolph B. Flershem, Charles O. Cornell, John H. Waters and Frank B. Cahn, as the Reorganization Committee constituted under the Plan and Agreement, dated February 11, 1931, for the Reorganization of National Radiator Corporation, filed a bill of complaint against the National Radiator Corporation in which they prayed (R., 18-21) for the appointment of receivers of said corporation, the sale of its assets and the distribution of the proceeds. On October 9th, 1931 (R., 93), the National Radiator Corporation appeared in the cause, admitted the allegations of the complaint and joined in the prayer for relief, and the court appointed Robert S. Waters and William G. Heiner receivers (R., 95).

The action was not brought on the ground that the corporation was insolvent or in imminence of insolvency.

Although the bill declares that intervention by the court was necessary to prevent "a multiplicity of suits, a race of diligence, wasteful strife and controversy" (R., 17), the fact is that on October 5th, 1931, the company was solvent and amply able to pay *in full, in cash,* every debt it owed, including the interest, but not the principal upon its outstanding debentures which, however, were not payable before August 1st, 1947. The jurisdiction was invoked solely for the purpose of effectuating a reorganization of the company in order to scale its funded debt and to coerce non-assenting debentureholders into subjection to the plan or else to wipe them out.

On August 8th, 1932 (R., 545), the cash, property and business, including the good-will of the company as a going concern (R., 439), were, pursuant to decree of the court (R., 420-485), sold for the sum of $2,550,000.00 (R., 555), the purchase being made in behalf of the Reorganization Committee under the Reorganization Plan (R., 548).

The petitioners, who jointly hold $121,000.00 principal amount of the company's debentures, were not parties to the cause, but on the 18th day of August, 1932, at a hearing set therefor, they appeared specially and opposed the confirmation of the sale on the ground that the court had never acquired jurisdiction over the subject-matter of the cause and therefore was without power to order the sale or to confirm it (R., 579; 582; 722-732).

The National Radiator Corporation, a Delaware corporation (R., 10), was engaged in the business of manufacturing and selling heating appliances, boilers and radiators (R., 15).

It was formed in August of 1927 by the merger of six companies (R., 49) and on December 31st, 1930, it had outstanding 58,646 shares of $7.00 cumulative preferred stock of no par value, and 272,708 shares of common stock, also of no par value, which, on that day, were carried on its books at $8,134,643.01 (R., 52).

On or about August 30th, 1927, the company authorized an issue of $16,000,000.00 principal amount, 6½% Sinking Fund Gold Debentures (R., 11), and pursuant to that authority, there was issued $12,000,000.00 of said debentures (R., 12), which, on October 5th, 1931, had been reduced to $10,673,000.00 (R., 164). The debentures mature on August 1st, 1947, and provide for the payment, in the interim, of interest semi-annually on the first days of February and August in each year, at the rate of 6½% per annum. The terms and provisions governing their issue and the appurtenant interest coupons, as well as the rights and remedies of the holders of debentures, are set forth in an Indenture, Schedule A annexed to the original bill (R., 23), made between the company and the Bankers Trust Company, a New York corporation, as Trustee (R., 11-12).

The merger was sponsored by the Bankers Trust Company and J. & W. Seligman & Company, New York bankers, who, in conjunction therewith, underwrote the debentures and sold them to the public (R., 372; 399-415).

On February 1st, 1931, the National Radiator Corporation refused to pay the installment of interest which then became due upon the debentures of which there were then outstanding $10,716,000.00 principal amount (R., 49; 52).

In the latter part of 1930, John H. Waters, President and Chairman of the Board of Directors, and Rudolph B. Flershem, Chairman of the Executive Committee, had decided upon a reorganization of the company in order to scale its funded debt. Thereupon, after consultation with the Bankers Trust Company and J. & W. Seligman & Company, Waters and Flershem appointed themselves and one Charles O. Cornell, a Reorganization Committee, and with the approval of the Bankers Trust Company, the Trustee of the debentures, decided as part of the plan to reorganize, not to pay the install-

ment of interest which would become due, upon the outstanding debentures, on February 1st, 1931 (R., 372; 623-624; 748-749).

On January 31st, 1931, the Board of Directors ratified the action of Waters and Flershem. The Board of Directors agreed with its Chairman (R., 748):

> "* * * that, although the cash working capital of the Company as shown by the balance sheet was reasonably ample, it was evident that, if the Company were to do an increasing volume of business, it would require the use of all or a substantial part of this cash to carry larger inventories and receivables, and that it would also be necessary to make large expenditures for the design of new products and for equipment necessary in their manufacture. Otherwise, the Chairman pointed out it might well prove to be impossible to maintain the Company's competitive business as against other enterprises in the industry. * * * "

There was submitted to the Board at said meeting a financial statement of the company as of December 31st, 1930, just one month before. A copy of the statement is contained in the Plan and Agreement annexed as Exhibit B to the bill of complaint (R., 49-92). That statement (R., 51-52) discloses that the net worth of the company on December 31st, 1930, was $8,134,643.01—its assets were $19,434,548.08, and its liabilities, including the outstanding debentures, $11,299,905.07. Especially noteworthy and impressive is the statement of its current assets and its current liabilities. On December 31st, 1930, the quick current assets of the National Radiator Corporation were $5,054.007.30 *and $1,701,899.94 of that was cash.* And its current liabilities at that time were only $491,895.72 (only $46,787.60 was presently due) and included therein was $293,339.58 accrued interest upon the outstanding debentures, computed to December 31st, 1930.

The ratio of cash to current liabilities was 3½ to 1, and of current assets to current liabilities was more than 10 to 1.

On February 1st, 1931, another month's interest, amounting to $53,580.00 on the debentures, had accrued and the current liabilities were thereby increased to $545,475.72. But it is indubitably apparent that on February 1st, 1931, the company could have paid all its current and maturing debts, including the interest on its outstanding debentures, out of the cash alone and there would still have remained in cash about $1,200,000.00, and none of the other current assets would have been affected. The company was manifestly solvent and liquid and its refusal to pay the interest upon its outstanding debentures was unconscionable.

On February 11th, the Reorganization Committee promulgated a plan of reorganization and appointed the Bankers Trust Company depositary under the plan (R., 70).

The plan is all in the interest of the company, discriminates between debentureholders and other creditors of equal rank, contains no provision for any new capital and makes no provision for non-assenting debentureholders.

The plan contemplates the organization of a new company to which is to be transferred all the assets of the old corporation, including the cash (R., 55). The capital structure of the new corporation is to be as follows (R., 56):

	Authorized	*To Be Presently Outstanding*
15-Year 5% Debentures	$5,500,000	$5,358,000
$7 Preferred Stock (no par value)	55,000 shares	53,580 shares
Common Stock (no par value)	400,000 shares	272,966 shares

The new debentures bear interest at the rate of 5% per annum which, however, is payable only out of income (R., 56).

The plan proposes to give to each holder of $1,000.00 principal amount of old debentures $500.00 principal amount of new debentures, 5 shares of new preferred stock and 20 shares of new common stock (R., 60-61).

Merchandise and service creditors are to be paid in full by the new company, unless they shall have previously been paid by the old company (R., 56).

The holders of the present preferred stock are to receive, share for share, common stock of the new corporation. Holders of the present common stock are to receive stock warrants of the new company in the ratio of 1 to 3, namely, one stock warrant of the new company for each three shares of common stock of the old company, upon payment, to the Reorganization Committee, of $1.00 for each warrant issued (R., 61). The holders of the warrants are entitled to purchase, on or before July 1st, 1941, shares of common stock in the new company upon payment of $20.00 per share (R., 60).

There is no provision for any assessment upon the preferred stockholders and the holders of stock warrants have until the 1st day of July, 1941, to decide whether to exercise their options or not.

Although the preferred stock is issued without par value, the holders of such stock upon involuntary liquidation are entitled to $100.00 a share, and on voluntary liquidation to $115.00 a share, thus placing the value of $100.00 a share upon said stock (R., 58-59).

The common stock is also without par value but the value placed on that stock in the scheme of reorganization is $20.00 per share, the price at which it may be purchased, by the holders of warrants, on or before July 1st, 1941 (R., 60).

Giving effect, therefore, to the values placed on the securities to be issued, the capital of the reorganized corporation is $16,175,320.00, which is made up as follows:

Bonds 15-Year 5% Debentures	$5,358,000.00
$7 Preferred stock no par value at $100.00 per share	5,358,000.00
272,966 shares at $20.00	5,459,320.00
Total	$16,175,320.00

The plan met with opposition. A committee known as the Bondholders' Protective Committee, purporting to represent debentureholders, was formed (R., 569-574; 752). And of that committee, Frank B. Cahn, one of the complainants and who later became a member of the Reorganization Committee, was a member (R., 574; 753). That committee condemned the management of the company, denounced the plan and advised debentureholders not to deposit thereunder but urged debentureholders to aid in their opposition to the plan by depositing their debentures with them. There was deposited with that committee in excess of $851,000.00 principal amount of debentures of holders who were opposed to the plan (R., 753).

On September 15th, 1931, the two committees arranged a settlement between themselves (R., 752-763). The Bondholders' Protective Committee agreed to deposit, under the Reorganization Plan, the debentures deposited with them (R., 758), and the Reorganization Committee agreed to allow the Bondholders' Protective Committee $35,000.00 for compensation, counsel fees and expenses of that committee (R., 759); to elect one of the Bondholders' Protective Committee to the Reorganization Committee (R., 761); and to make one of that committee a member of the Board of the new company (R., 761).

On September 17th, 1931, Frank B. Cahn, a member

of the Bondholders' Protective Committee, was, pursuant to the terms of the settlement, elected a member of the Reorganization Committee (R., 766).

On September 15th, 1931, the Reorganization Committee declared the plan operative. More than 81% of debentures had been deposited under the plan but there were still 19% who had not assented thereto (R., 535).

The Indenture provides that in the event of a sale by the company of its property as an entirety, the obligations of the debentures shall be assumed by the purchaser (R., 45-47). It is therefore obvious that unless the new company was willing to assume the obligations of the debentures held by non-assenting debentureholders, it was necessary to find a means for transferring the property of the National Radiator Corporation to a new company, free from those obligations.

On August 1st, 1931, the company had also refused to pay the installment of interest which then became due upon its outstanding debentures.

A large number of debentureholders refused to assent to the plan, demanded payment of their interest and, when such payment was refused, some brought suit (R., 767). Thereupon, the Reorganization Committee, two of whose four members are officers and directors of the company, decided to file the bill of complaint and, in accordance with that decision, the bill was filed and the National Radiator Corporation appeared and consented to the decree which was entered. Robert S. Waters, Vice-President and General Manager of National Radiator Corporation (R., 206), and a son (R., 237) of John H. Waters, its President, Chairman of its Board of Directors and a member of the Reorganization Committee, and William G. Heiner, an attorney, were appointed receivers of that company (R., 96).

The bill was filed "not only to forward the purposes of the Reorganization Plan but also to prevent a multiplicity of suits against National Radiator Corporation

with consequent wasteful strife and controversy" (R., 767). The expressed and avowed purpose of the suit was to defeat non-assenting debentureholders of their rights and to accomplish the transfer of the corporation's property to a new corporation, free from the obligations to them.

On October 5th, 1931, the company was solvent and able to pay all its obligations then due and payable—*in cash, in full.* The company was both solvent and liquid.

A statement of the company's assets on October 8th, 1931, is contained in the Record at page 781.

The assets are valued at	$11,944,244.38
This does not include Good-will, Trade Marks and Patents (R., 782)	6,634,501.90
which would make the total assets	$18,578.746.28

But what is especially interesting is the statement of current assets. A summary of those assets is as follows (R., 781):

Cash		$1,257,381.59
Notes and Accounts Receivable	$1,673,373.59	
Less Reserve for Bad Debts and Doubtful Notes and Accounts Receivable	179,046.37	1,494,327.22
Inventory		2,048,901.97
Stocks and Bonds		104,582.36
Life Insurance Policies (Cash Surrender Value)		18,984.00
New York State Highway Bonds		15,550.40
Total		$4,939,727.54

The statement does not set forth the liabilities, but the Decree does (R., 435-436). Besides the $10,673,000.00 outstanding debentures which were not payable before August 1st, 1947, the liabilities were:

Past Due Interest on Debentures (R., 435)	$709,395.69
Other Debts (R., 436)	157,511.89
Total	$866,907.58

The company on October 5th, 1931, could have paid all its current debts, including the overdue interest upon the debentures out of the cash alone and there would still have remained in cash $400,000.00, and none of the other current assets would have been affected.

Almost the very first official act of the Receivers was to disavow the statements of the bill and the findings of the District Court. The complaint alleged (R., 16) and the court found that the National Radiator Corporation is (R., 95) "presently unable to meet and discharge its obligations which have already matured without seriously jeopardizing the ability * * * to continue in business * * *".

On October 23rd, 1931, two weeks after their appointment, the Receivers procured an order (R., 779-780), authorizing them to invest "such amount or amounts of cash of the receivership estate as, in the judgment of the Receivers, is not needed at the time for expenses and working capital; * * *".

And thereupon the Receivers proceeded to invest, and kept invested, $1,030,000.00 of the company's cash (R., 381-382),—

$980,000.00 in United States Treasury Certificates of Indebtedness, and

$50,000.00 in Bank Certificates of Deposit.

One million thirty thousand ($1,030,000.00) Dollars—more than was necessary to pay the overdue interest on

the debentures and the other debts of the company—the Receivers invested in government and bank certificates because it was not needed in the conduct of the business.

In furtherance of the reorganization plan, and to forestall further action by non-assenting debentureholders (R., 767), the Bankers Trust Company, as Trustee, at the request of the Reorganization Committee (R., 169; 67-68), on October 13th instituted suit and recovered judgment against the National Radiator Corporation in the District Court, for the February 1st and August 1st installments of interest upon the outstanding debentures (R., 786). As part of the procedure followed in bringing to a sale the properties and assets of the National Radiator Corporation, and in consummating its reorganization (R., 773), the Bankers Trust Company, as Trustee, also at the request of the Reorganization Committee (R., 170-173; 775), declared immediately due and payable (because of the default in the payment of interest) the principal of the outstanding debentures and, after demand upon and refusal by the National Radiator Corporation to pay the same, instituted suit and recovered judgment therefor in the District Court on December 30th, 1931 (R., 788-789). Thereafter, on January 9th, 1932, in conformity with the procedure adopted by the Reorganization Committee and at its request (R., 775), the Bankers Trust Company, as Trustee, intervened in the cause as a party plaintiff and in its petition of intervention, adopted all of the allegations of the bill and joined in its prayer for relief (R., 128-138).

The complainants were now ready for a sale and in March, 1932, the court heard testimony for the purpose of fixing the upset price.

No notice of the hearings was given to any non-assenting creditors and, with the exception of the intervener, First National Bank of Cincinnati, none took part in those hearings.

Nor did the District Court order an appraisal to be made by independent and impartial experts. In fixing the upset price, the District Court relied upon the notions of Robert S. Waters (R., 206-333; 359-369), one of the receivers, Vice-President and General Manager of the company and a son of John H. Waters (R., 370-378), President and Chairman of the Board of that company and a member of the Reorganization Committee; of Rudolph B. Flershem (R., 333-358), Chairman of the Executive Committee of the company and also a member of the Reorganization Committee; of John H. Waters; and of William G. Heiner (R., 379-395), the other receiver, an attorney at law who, previous to his appointment, never had any experience whatever in the radiator or boiler business. They testified it would be possible to realize for all the assets of the company, including almost $2,000,000.00 of cash, at most $2,300,000.00 (R., 232; 339-340; 343; 383). They based their opinions upon the financial condition of the company as of December 31st, 1931. The assets at that time were as follows (R., 381-382):

Cash	$852,096.29
United States Certificates of Indebtedness	980,000.00
Interest on United States Certificates	6,124.97
Bank Certificates of Deposit	50,000.00
Cash Surrender Value of Life Insurance	22,900.00
Deposit New York Workmen's Compensation Law	18,686.33
Total Cash Assets	$1,929,807.59
Accounts Receivable (less reserve for bad debts, etc. [R., 359])	858,992.41
Inventory	1,634,905.25
Total Current Assets	$4,523,705.25

Besides those assets, there were plants, machinery, patents, good-will, trade marks, patterns and investments in affiliated companies, which were carried on the books of the company at $13,000,000.00 (R., 782) and which, in 1927 when the merger was formed and the debentures sold, were appraised at upwards of $16,000,000.00 (R., 406). Eighteen million dollars of assets were, in their opinion, worth a paltry $400,000.00 over and above the almost $2,000,000.00 of cash on hand. They explained that the difference between the book value and their opinions represented the difference between liquidation and a going concern (R., 222-223; 225-226; 232-233; 328-329; 331; 338-339; 343-344; 346-347; 348-349; 373).

On May 31, 1932, the court ordered sold all property and interests in property of every kind, character and description, including all the business, good-will, corporate name, patents, trade marks, trade names, bills and accounts receivable, choses in action and *cash on hand or in bank* (R., 439), and fixed the upset price therefor at $2,500,000.00 (R., 481). On August 8th, 1932, the Reorganization Committee purchased the business and assets of the corporation as a going concern for the sum of $2,550,000.00 (R., 544-556).

The Circuit Court of Appeals in its opinion, per Woolley, C. J., said:

> "* * * It is pertinent to note the bill did not say the corporation was insolvent. That, in effect, was a tacit admission or declaration of its solvency. The corporation, by its answer, admitted the truth of all allegations of the bill.
>
> "Concededly, the corporation was solvent in the sense of having fluid assets enough to pay its debts then due in the usual course of trade—without giving thought to the consequences. * * *"

The Questions Presented.

1. Did the Circuit Court of Appeals rightly decide that the District Court had jurisdiction over the subject matter of the cause?

2. May a Federal court of equity take jurisdiction of a corporation which is solvent and able to pay in full, in cash, its debts presently due and payable, for the sole purpose of reorganizing it?

3. May a Federal court of equity take jurisdiction and appoint receivers of a corporation which is solvent and able to pay and discharge in full, in cash, all its debts then due and maturing, merely because of the possibility that in the future, the corporation may be unable to meet the debts which would then become due?

4. May a Federal court of equity take jurisdiction and appoint receivers of a corporation which is solvent and able to pay and discharge in full, in cash, all its debts then due and maturing, merely because the Board of Directors decides that it is desirable to reorganize it in order to scale its funded debt?

5. If in the case of a corporation as above described, jurisdiction did not exist *ab initio*, may jurisdiction nevertheless be retained merely because subsequently through the collusive default in the payment of the interest upon the funded debt, the corporation may have been rendered insolvent or in imminence of insolvency?

Reasons Relied on for the Allowance of a Writ.

A.

The exercise of jurisdiction in this cause is wholly without precedent and marks a departure from the ac-

cepted principle of law governing equity receiverships. It permits a going corporation, which is solvent and amply able to meet and discharge its debts due and maturing, to evade its just obligations.

B.

The exercise of jurisdiction in this cause carries to the extreme the abuses so strongly condemned by this Court in Harkin vs. Brundage, 276 U. S., 36; Michigan vs. Michigan Trust Co., 286 U. S., 334; and Shapiro vs. Wilgus, 287 U. S., 348.

C.

The exercise of jurisdiction in this cause violates the fundamental rules of property and rights of creditors and constitutes a taking of property without due process of law, in violation of the Fifth Amendment of the Constitution of the United States.

Importance and Novelty of the Questions.

The questions involved in this cause are novel and in importance transcend the private interests of the petitioners. This Court has thrice warned against the perversion of the function of receivership and its use for the purpose of hindering and delaying creditors in the enforcement of their rights.

The legitimate functions of the remedy and the uses and extent to which it may be employed have never been definitely delimited by this Court. There is no doubt that the doctrine in this case, unless reversed, will be widely applied and will be used as a precedent for the right of corporations to reorganize in order to scale their funded debts when, in the discretion of the board of directors, such a course is advisable.

The present case and the case of "Lily Clapier vs. Flershem, et al.," in which a petition for a writ of certiorari is being presented to this Court simultaneously herewith, place before this Court for the first time the whole subject of equity receiverships and their legitimate function.

We respectfully submit that it is of public importance that this Court should authoritatively and definitely define the uses, functions and limits of that remedy.

WHEREFORE, it is respectfully submitted that this petition for a writ of certiorari to review the decree of the Circuit Court of Appeals for the Third Circuit, should be granted.

AMY ARZT,
JOSEPHINE RAMSEY.

DAVID M. PALLEY,
of New York, N. Y.

CHARLES H. SACHS,
of Pittsburgh, Pa.,
of Counsel.

IN THE

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No.

AMY ARZT and JOSEPHINE RAMSEY,

Petitioners
(Appellants Below),

vs.

RUDOLPH B. FLERSHEM, CHARLES O. CORNELL, JOHN H. WATERS and FRANK B. CAHN, as the Reorganization Committee constituted under the Plan and Agreement, dated February 11, 1931, for the Reorganization of National Radiator Corporation, BANKERS TRUST COMPANY, as Trustee, NATIONAL RADIATOR CORPORATION, Delaware, NATIONAL RADIATOR CORPORATION, Maryland, ROBERT S. WATERS and WILLIAM G. HEINER, as Receivers of National Radiator Corporation, Delaware, and CARL E. RESLEY and G. FRANKLIN LUDINGTON,

Respondents
(Appellees Below),

FIRST NATIONAL BANK OF CINCINNATI, INTERNATIONAL HEATER COMPANY and EDWARD J. RAMSEY,

Respondents
(Appellants Below).

BRIEF IN SUPPORT OF PETITION.

Opinions Below.

The opinion of the Circuit Court of Appeals for the Third Circuit is not yet reported; the opinions of

Judge Gibson appear at pages 416 and 691 of the record but have not been reported.

Jurisdiction.

The decree of the Circuit Court of Appeals was entered in the office of the Clerk of the Circuit Court for the Third Circuit on March 24th, 1933.

Jurisdiction to issue the writ is found in the provisions of Section 240-A of the Judicial Code as amended by the Act of February 13th, 1925.

Statement of Facts.

The principal facts are stated in the foregoing petition.

Specifications of Error.

1. The Circuit Court of Appeals erred in affirming all orders and decrees of the District Court appealed from.

2. The Circuit Court of Appeals erred in not reversing the decrees of the District Court, dated October 9th, 1931, May 31st, 1932 and September 8th, 1932, as to the petitioners and all other creditors who did not assent to the plan of reorganization.

3. The Circuit Court of Appeals erred in holding that jurisdiction over the subject matter of the cause existed and was properly exercised.

4. The Circuit Court of Appeals erred in holding that the exercise of jurisdiction in this cause did not constitute a taking of property without due process of law in violation of the Fifth Amendment of the Constitution of the United States.

Argument.

I.

The exercise of jurisdiction in this cause marks a departure from the accepted principles of law governing equity receiverships; violates the fundamental rules of property and rights of creditors; and constitutes a taking of property without due process of law in violation of the Fifth Amendment of the Constitution of the United States.

It is a fundamental principle of our jurisprudence that the property of a debtor should be applied to the payment of his debts. To that end our courts—law and equity—are invested with power to sell the property of an unwilling debtor and to distribute the proceeds to his creditors; but payment may not be demanded nor the power invoked before the debt is due.

The creditor has not the right of selection and if the property available to legal process be sufficient to discharge the debt, no appeal to equity lies. The appeal, whether to law or equity, is for the enforcement of payment through the power of sale and distribution.

Equity, however, will not exercise its jurisdiction except where the legal remedy is inadequate.

The assets of an insolvent corporation are deemed held in trust for the benefit of its creditors and equity will take jurisdiction to administer that trust. This trust doctrine has been extended also to corporations in imminence of insolvency; corporations which though solvent would be rendered insolvent if all creditors with debts presently due and maturing should insist upon immediate payment.

Jurisdiction, however, depends upon the right to enforce payment through its power of sale and distribution. It is distinctly a creditors' remedy for the enforcement of creditors' rights. The reason underlying

its exercise is the rule of distribution rateably amongst creditors of the corporation.

Receivership is an ancillary remedy granted—pending sale—to prevent the acquisition of priority and preference in such distribution.

Reorganization is but an incident of the exercise of that power. It is a combination of persons with similar interests and whose interests are equitably adjusted to purchase the property at the sale and to use such property after purchase to their mutual advantage. The raison d'etre of the remedy, however, is the enforcement of payment and not reorganization.

It is therefore essential to the exercise of jurisdiction that the corporation be insolvent or be in imminence of insolvency; that it have debts presently due and payable but which it is unable to pay. The mere refusal to pay does not confer jurisdiction upon the court; there must be debts now due and the inability to pay them.

That essential element is manifestly lacking in this case. The power of sale and distribution was usurped for the purpose of hindering and delaying creditors and absolving the corporation from debts not yet due and not maturing until 1947. Reorganization was the primary relief sought and the power of sale was the means adopted for its accomplishment. Jurisdiction was assumed and retained not because of present insolvency through inability to pay debts presently due and maturing, but because of possible future insolvency through the possible inability in the future to pay debts which would then mature. Such a doctrine substitutes conjecture for accepted principles of law. It is without precedent.

If possible future inability to pay debts not yet due can be laid as a basis for the use of the power of sale and distribution, then such rule should be available to the creditors as well as the debtor. Clearly, over the objection of the National Radiator Corporation which was able

to pay its debts present and maturing in full, in cash, such a right would not be allowed.

Jurisdiction cannot be conferred by consent, nor can a debtor by collusion with a friendly creditor and an obliging trustee effect a transfer of its assets and a commutation of its debts. The granting of a remedy where no right thereto exists constitutes a denial of due process of law to those who are prejudiced thereby.

Because in the proper case a reorganization may result from the assumption of jurisdiction by a court of equity does not justify the exercise of jurisdiction where the basic essential elements do not exist.

Conclusion.

It is important that the questions and principles governing equity receiverships be authoritatively settled by this court.

Respectfully submitted,

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